No. 14-915

IN THE

Supreme Court of the United States

REBECCA FRIEDRICHS; *et al.*,

Petitioners,

v.

CALIFORNIA TEACHERS ASSOCIATION, *et al.*,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* CENTER ON NATIONAL LABOR POLICY, INC. AND NATIONAL INSTITUTE FOR LABOR RELATIONS RESEARCH, INC., *et al.*, IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), allowing public sector "agency shop" arrangements should be reversed under the First Amendment.

2. Whether the First Amendment freedom of association requires public sector employees to affirmatively object to the payment of monies to subsidize union speech rather than requiring the labor organization to obtain their consent to subsidizing union speech.

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INTEREST OF THE *AMICI*

The Center on National Labor Policy Inc. ("Center") and the National Institute for Labor Relations Research, Inc. ("Institute") submit this brief *amicus curiae* in support of Petitioner Rebecca Friedrichs, *et al.* The parties have given blanket written consent to filing *amicus curiae* briefs.[1]

The Center is a public interest legal foundation chartered to provide legal assistance to individuals whose statutory and constitutional rights in the labor arena have been violated by powerful, organized interests such as labor unions and governmental entities. The Center has filed briefs amicus curiae advocating the validity of this public policy interest in other cases before this court, including *Harris v. Quinn*, No. 11-681; *Granite Rock Co. v. Teamsters, Local 287*, No.08-1214; *Lehnert v. The Ferris Faculty Assn.-MEA-NEA*, No. 89-1217; and *New York Telephone Co. v. N.Y.S. Department of Labor*, No. 77-961.

The Institute is a nonprofit educational organization that since 1983 has served as an educational research facility for the general public, scholars and students. It provides analysis and research to expose the inequities of compulsory unionism. Its interest is to improve public understanding that coercive union association

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[1] Pursuant to Rule 37.6, amici affirm that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici*, their members, or their counsel made a monetary contribution to its preparation or submission.

typically fails to improve the material conditions of workers even as it tramples their individual freedom.

The *amici* are filing this amicus brief to support the Petitioners because the two issues being considered are greatly important to their members and protecting individual rights. The *amici* wish to bring to the Court's attention that reinstitution of Petitioners' First Amendment freedoms will not have an adverse effect on public sector collective bargaining and there will be no adverse impact on public policy and public sector labor law if the Ninth Circuit's aberrant decision is reversed.

SUMMARY OF ARGUMENT

The Center and Institute file this brief to bring three facts to the Court's attention. *First*, unions often pursue agendas in collective bargaining with which teachers disagree and do not benefit. *Second*, the National Education Association ("NEA") and its affiliates are already planning for life without compulsory fees, which illustrates that compulsory fees are unnecessary for collective bargaining. *Third*, the extraordinary power the government grants to exclusive union representatives skews the political and policy making process and violates the central tenet of equality of political speech embodied in the First Amendment.

ARGUMENT

I.
DATA AND EXPERIENCE CONFIRM THAT MANY TEACHERS DISAGREE WITH THE POSITIONS AND AGENDA OF THEIR EXCLUSIVE BARGAINING REPRESENTATIVES.

Most of the nation's teachers oppose mandatory agency fees. Education Next's most recent national poll conducted in May-June 2015 reveals:

> Only 34% support agency fees, while 43% oppose them, with the balance taking a neutral position. If we exclude the neutral group, then a clear majority, 56% of those with an opinion, say they want to end mandatory agency fees. This finding comports with the public's overall opinion of teachers unions, as only 30% of respondents say unions have had a positive effect on schools and 40% say they have had a negative effect.[2]

A majority of teachers likely oppose agency fees because they believe in the right of each individual to choose with whom they associate, which is a fundamental First Amendment value. However, it is also likely that many teachers oppose forcing their co-workers to support a union because they disagree with

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[2]http://educationnext.org/201-ednext-poll-school-reform-opt-out-common-core-unions/#

the union's positions and advocacy.

Unions often pursue bargaining agendas with which represented employees disagree or from which they do not benefit. *See Knox v. SEIU*, 132 S. Ct. 2277, 2289 (2012) (quoting *Ellis v. Railway Clerks*, 466 U.S. 435, 455 (1984) (finding that, under an agency shop, "'[t]he dissenting employee is forced to support financially an organization with whose principles and demands he may disagree'"). *Abood v. Detroit Federation of Teachers*, 431 U.S. 209, 222 (1977), itself recognized as much ("An employee may very well have ideological objections...moral or religious views...economic or political objections to unionism itself"). This has only become more clear over time.

In *Crete Educ. Assn. v. Saline County School District*, 654 N.W.2d 166 (Neb. 2002), this NEA affiliate successfully sued to prevent a signing bonus for a hard to fill industrial technology teacher position. The Supreme Court of Nebraska agreed with the union that the signing bonus for a prospective teacher—neither a union member nor a member of the bargaining unit, was a mandatory subject of bargaining.

In *Kenmare Educ. Assn. v. Kenmare Public School Dist. No. 78*, 717 N.W.2d 603 (N.D. 2006), the NEA affiliate sued to prevent the school district from filling a speech language pathologist position with a starting salary higher than the contract rate to cease contracting out that service at an even higher cost. The Supreme Court of North Dakota determined the school district had bargained to impasse on this subject and could implement the bonus language.

These cases are not surprising as the NEA resolved in 2000: "The Association opposes providing additional compensation to attract and/or retain education employees in hard-to-recruit positions."[3] School districts have been "calling for cash incentives to attract math and science teachers, a new effort to compete with higher-paying private businesses that would change the way teachers are paid." M. Sacchetti, *School Chiefs Urge Case Lure for Math and Science Teachers*, Boston Globe (Nov. 13, 2006).[4] School districts that need a different pay strategy to hire for difficult science and engineer positions where private sector pay is much higher are left without options. *Official: teacher pay must be raised*, Sioux City Journal (Oct. 23, 2007).[5]

In Colorado, the Denver Classroom Teachers Association resisted continuing plans to increase average teacher pay by 18%, with bonuses and incentives for teachers taking on "harder assignments or in difficult schools," instead of annual cost of living and step increases. *Merit pay splits DPS, union*, The Denver Post (Aug. 11, 2008).[6] "The district wants to

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[3]http://eiaonline.com/archives/20000705.htm

[4]http://www.boston.com/news/education/k_12/articles/2006/11/13/school_chiefs_urge_cash_lure_for_math_and_science_teachers/

[5]http://siouxcityjournal.com/news/state-and-regional/official-teacher-pay-must-be-raised/article_c486f979-187e-536a-a149-e3c098520241.html

[6]http://www.denverpost.com/headlines/ci_10160873

use that revenue to sweeten its incentive-based pay, such as for those who teach difficult subjects in hard-to-staff schools. It also wants to direct more money to teachers who are early in their careers." *Colorado: An unprecedented offer for teachers*, Rocky Mountain News (May 30, 2008).[7]

In Washington, the Seattle Education Association refused to allow participating teachers to be paid for work to be performed under a $13.2 million National Math and Science Initiative grant awarded to the State. The Union blocked receipt of the grant money. *Sad failure of teachers and their union chiefs*, The Seattle Times (May 8, 2008).[8]

These cases show public sector unions act to prevent nonmembers from obtaining benefits from employers. What other subjects are mandatory subjects of public sector collective bargaining remain in dispute, but include class size, school calendar, teacher evaluations, smoking on school property despite health hazards, length of work day, and merit pay. *See* Malina & Kerchneraal, *Charter Schools and Collective Bargaining: Compatible Marriage or Illegitimate Relationship?*, 30 Harvard Journal of Law & Public Policy 885 913-18 (Summer, 2007).

Compensation in public schools reflect less innovation than in charter and private schools.

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[7]http://blogs.ubc.ca/workplace/2008/05/colorado-an-unprecedented-offer-for-teachers/

[8]http://www.seattletimes.com/opinion/sad-failure-of-teachers-and-their-union-chiefs/

Whereas public schools almost exclusively utilize a pay schedule, private and charter schools do not use them or use them "as a starting point rather than the sole determinant of teachers' pay." J. Kowel, E. Hassel & B. Hassel, *Teacher Compensation in Charter and Private Schools* (Center for American Progress).[9] Teacher salaries rise 1% for every student. "A reduction in class size tends to be very expensive." E. Hamushek & J. Luque, *Smaller Classes, Lower Salaries? The Effects of Class Size on Teacher Labor Markets*, Hoover Institution (Stanford 2000).[10]

II.
UNION REPRESENTATIVES DO NOT ALWAYS WORK TO BENEFIT TEACHERS THROUGH COLLECTIVE BARGAINING.

In *Harris v. Quinn*, 134 S. Ct. 2618, 2634 (2014), this Court recognized that "a critical pillar of the *Abood* Court's analysis rests upon an unsupported empirical assumption, namely, that the principle of exclusive representation in the public sector is dependent on a union or agency shop." *Abood's* assumption is unwarranted for several reasons, the most obvious because exclusive representation functions in a host of jurisdictions without an agency shop requirement. This includes the federal

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[9]https://www.google.com/search?q=TEACHER+COMPENSATION+IN+CHARTER+SCHOOLS&rlz=1C1XIOB__US598US600&oq=teacher+comp&aqs=chrome.0.69i59j0j69i57j0l3.2777j0j8&sourceid=chrome&es_sm=122&ie=UTF-8

[10]http://hanushek.stanford.edu/publications/smaller-classes-lower-salaries-effects-class-size-teacher-labor-markets

government, 5 U.S.C. § 7102, the postal service, 39 U.S.C. § 1209(c), and in the private sector in the nation's twenty-five right-to-work states.

The NEA is itself planning for a future without agency fees. The NEA Center for Organizing produced a Toolkit for "Engaging Members and Leaders in a Non-Agency Fee World" in April 2014.[11] Developed with assistance of the Respondent CTA, it lays out a political program to organize agency fee payers if its ability to demand mandatory dues payments end. The strategy engages existing members to recommit to the union and to organize the agency fee payers with a "blitz over two weeks to talk to every persuadable Fair Share member."

One contributor to this plan, the Alabama Education Association ("AEA"), successfully exists in a state without public sector collective bargaining and touts it is funded by voluntary dues from 90% of teachers, using the money to fund political activity and to engage in "legislative battles" for its membership.[12] Its successes are secured through legislative action, rather than through collective bargaining with a legislative entity.[13] All those efforts confirm "[t]he purpose of collective bargaining is to give them as employees, a larger voice than the ordinary citizen." Summers, *Public Employee Bargaining: A Political*

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[11] http://www.eiaonline.com/NEAAgencyFeeToolkit.pdf

[12] *See* http://www.encyclopediaofalabama.org/article/h-2528

[13] http://www.myaea.org/issues/aea-successes/

Perspective, 83 Yale L. J. 1156, 1193 (1974).[14]

Even if the NEA's plan to convince agency fee payers to join the union does not achieve its goals, losing revenue from the Petitioners, if *Abood* is overruled, will not endanger the representative status of NEA affiliates. The NEA has 100,873 agency fee payers nationwide, of which 28,323 (or 28%) of these fee payers are in California.[15] This number amounts to only 3.9% of all teachers represented by NEA affiliates. CTA reported membership dues of $177,911,205 in the year ending August 31, 2011. JA 367. Its annual *Hudson* agency fee notice demanded $647 per teacher, JA 355, or 10.3% of its collected fees. The amount is not significant to endanger the CTA's representative status—it is comparable to the AEA.

Demonstrating the benefits of union membership is how this support gap is resolved consistent with the First Amendment; mandating involuntary financial support is not.

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[14]Despite low private sector membership in southern states, public sector union membership in those states is vastly higher. A. Hodges, *Southern Solutions for Wisconsin Woes*, 43 Tol. L. Rev. 633, 634 (Spring 2012) (Alabama: 5.7% private sector membership, 28.9% public sector membership)

[15]http://us4.campaign-archive1.com/?u=9242ebcd8e0cf5b694d129fbf&id=0e0db6c828&e=249da70e40

III.
THE MANDATORY ASSOCIATION OF AGENCY FEE PAYERS AND THEIR DUES CONTRIBUTIONS TO UNIONS BURDEN THE FIRST AMENDMENT RIGHT OF ASSOCIATION BY IMPOSING UPON THE OBJECTORS AN IMPERMISSIBLE AND UNWARRANTED LEGAL INEQUALITY WITH THE UNION IN POLITICAL SPEECH.

In *Abood*, Justice Powell recognized that "[i]f power to determine school policy were shifted in part from officials elected by the population of the school district to officials elected by the School Board's employees, the voters of the district could complain with force and reason that their voting power and influence on the decisionmaking process [of government] had been unconstitutionally diluted." 431 U.S. 209, 261 n.15 (concurring in judgment). "To permit one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees." *City of Madison, Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm.*, 429 U.S. 167, 175 (1976).

As established below, compulsory unionism is diluting the democratic process, as issues of public policy are increasingly being shifted from subjects now open to debate to the closed doors of the collective

bargaining process or confidentiality agreements.[16] "Other rights, even the most basic are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right." *Wesberry v. Sanders*, 376 U.S. 1, 18-19 (1964). As the Court knew in *Abood*, this inequality has been achieved. Under Michigan law, when a collective-bargaining agreement conflicts with a "valid municipal ordinance, the ordinance must yield to the agreement." *Abood*, 431 U.S. at 253.[17]

A "union takes many positions during collective bargaining that have powerful political and civic consequences." *Knox*, 132 S. Ct. at 2289. *Abood* itself recognized as much: that "public employee unions attempt to influence governmental policymaking." 431 U.S. at 231. The concurring opinions in *Abood* were to the same effect. Mr. Justice Rehnquist noted that "success in pursuit of a particular collective bargaining

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[16] *See* B. Turque, *D.C. Teachers, Rhee Appear Close to Contract; Both Sides Might Yield Some Ground*, Washington Post (Sept. 11, 2009) (confidentiality agreement cited for no public dislosure of unresolved issues); http://www.washingtonpost.com/wp-dyn/content/article/2009/09/10/AR2009091004312.html

[17] In 2011, the California Government Code was amended by Assembly Bill 646 to permit a labor organization to move for a public fact finding hearing when an impasse in collective bargaining negotiations is reached. *See* Cal. Gov't Code §3505.4. If fact finding and mediation attempts are unsuccessful, the public agency may move for a public hearing and thereafter implement its last offer, unless bound to an interest arbitration provision. Cal. Gov't Code §3500.7. This particular procedure is peculiar to California.

goal will cause a public program or a public agency to be administered in one way; failure will result in its being administered in another way." *Id.* at 243 (concurring opinion); *see id.* at 257-58 ("Collective bargaining in the public sector is 'political' in any meaningful sense of the word....bargaining extends to....educational policy that will inform the high school curriculum.") (Powell, J.)

California grants teachers many special privileges and powers to assist their ability to influence public policy. This includes: (1) the duty of state agencies to meet and negotiate in good faith with an exclusive representative, *see* Cal. Gov't Code § 3540.1(h); (2) the duty of state agencies to not deal with other organizations, individual employees, or citizens, *see id.* at §§ 3453.1(a), 3543.3; (3) extraordinary means to defend the union contract by setting long terms, withdrawing issues from further political comment or consideration by the public in a manner that no other interest group can use to immunize its political victories from attack; and 4) subscribing to agency shop agreements which ensure the financial ability to underwrite the union's political action, see Cal. Gov't Code §3546(a).[18]

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[18]"(a) Notwithstanding any other provision of law, upon receiving notice from the exclusive representative of a public school employee who is in a unit for which an exclusive representative has been selected pursuant to this chapter, the employer shall deduct the amount of the fair share service fee authorized by this section from the wages and salary of the employee and pay that amount to the employee organization. Thereafter, the employee shall, as a condition of continued employment, be required either to join the recognized employee

(continued...)

In addition, the State has granted the CTA "tax-exempt" status. Cal. Rev. & Tax. Code §23701a. This privilege grants the union substantial assistance in furthering their parochial political goals. As in *Jackson v. Statler Foundation*, 496 F.2d 623, 629 (2d Cir. 1973), *cert. denied* 420 U.S. 927 (1975); "[i]t is highly unlikely that they could sustain their programs at anywhere near present levels without the exemptions." Exemption is a valuable governmental benefit in so far as it operates to clothe the union with powers not available to the public.

Such authority, power and structure closely resembles that of the sovereign itself. The Court has noted that "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body." *Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 202 (1944) (emphasis added). "The collective-bargaining agreement to which a public agency is a party is not merely analogous to legislation, it has all the attributes of legislation for the subjects with which it deals." *Abood*, 431 U.S. 252-53 (Powell, J.; concurring). The California Supreme Court's position on this subject is persuasive. "[W]here a union has ... attained a monopoly of the supply of labor .. such a union occupies a quasi public position similar to that of a public service business and .. .. It may no longer claim the same freedom from legal restraint enjoyed by golf clubs or fraternal associations." *James v. Marinship Corp.*, 25 Cal. 2d 721, 155 P.2d 329, 335 (1944) (emphasis added).

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[18](...continued)
organization or pay the fair share service fee...."

Since *Abood*, the action of public sector unions have become more intrusive as traditional areas of public policy is usurped into collective bargaining. As Professor Summers discussed in *Public Sector Collective Bargaining Substantially Diminishes Democracy*, 1 Government Union Review 5 (Winter 1980):

> A public employee collective bargaining statute typically carves out a large portion of formerly exclusive legislative and budgetary jurisdiction and requires that the agency share that jurisdiction with unions in the guise of "bagpiping over terms and conditions of employment." In the educational field, such matters as the length of the school day, class size, teacher recruitment and retention policies, wages and fringe benefits and much else is taken to fall within the phrase "bargaining over terms and conditions of employment." Yet decisions on such matters are decisions of public law and policy. Indeed, collectively they go far to determine the very nature and quality of the benefit the government unit exists to provide.[19]

For example here, CTA can bargain with the

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[19] *See generally* "Project: Collective Bargaining And Politics In Public Employment," 19 U.C.L.A. L. Rev. 887 (1972); Arthur S. Miller, *Private Governments and the Constitution* (occasional paper for the Center for the Study of Democratic Institutions, 1959).

School Board on numerous statutorily designated subjects, such as wages, class size, evaluations, layoff, leave, safety conditions. Cal. Gov't Code § 3543.2(a)(1). In so doing, the Union engages in the allocation of the districts's budget, acts otherwise arrived at through the open political process in establishing public policy. Since the requirement of negotiation with the union exists as a mandate of state law, the union-School Board agreement, its selections and deletions, amount to the creation of state public policy and therefore becomes a "law" as enforceable against all other citizens had the California legislature enacted it.

All these privileges affect the allocation of public resources, tax revenues, and the choices affect all citizens. *See* E. Viera, *"To break and control the violence of faction," The Challenge to Representative Government from Compulsory Public-Sector Collective Bargaining* (Lib. Cong. No. 80-65161, 1980) 30-35.

> Questions of this kind, however, involve political considerations of the most wide-ranging sort, including budget allotments, levels and rates of taxation, the quantity and quality of public services, and the size of the public debt. Therefore, to believe that the political inequality embodied in compulsory public-sector collective bargaining has only a *de minimus*, "merely economic" effect is foolish.

Id. at 34.

This transfer of policy making from the public

sphere to the actors in collective bargaining Professor Summers has argued, *supra*, diminishes democracy. He observes that it "divides public authority and redistributes a share of it to private entities -- mainly unions -- who are not elected by nor answerable to the public." Summers, "Public Sector Bargaining," *supra* at 6. Policy decisions are being made by non-elected officials, who are unanswerable to the electorate for their decisions affecting public monies and public policy. This power and authority must be termed governmental because it became available when California created the statutory scheme providing special powers and privileges to the private-interest, public-sector labor unions that exist no where else, including the private sector.[20]

The agency fee paying Petitioners' choice to exercise their First Amendment right not to become

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[20]Professor Summers also notes that public sector bargaining:

> restructures processes for the exercise of that authority to enable these unions to participate in its exercise according to the traditional mode of union functioning, namely collective bargaining itself an adversarial process; alters in varying degrees the outcomes of these processes for the exercise of governmental authority and thereby modifies the benefits conferred (and their costs) and brings some discontinuation of benefits (strikes); eliminates or reduces public accountability of participants for their share in these processes and outcomes; and undermines the general conditions for healthy democratic government with society at large.

Summers, "*Public Sector Bargaining*," supra at 6.

CTA members, not only stripped them of the right to negotiate their own terms and conditions of employment as an employee of the school system under state law. but also deprived them of an equal right to bargain for school system resources as an individual citizen—a right barred by law. Petitioners' constitutional rights are infringed when they *must* provide financial support for the political choices the Union chooses to negotiate on with their own public employer.

"[C]ontributing to an organization for the purpose of spreading a political message is protected by the First Amendment." *Abood*, 431 U.S. at 234. "[T]he transformation of contributions into political debate involves speech by someone other than the contributor." *Buckley v. Valeo*, 424 U.S. 1, 21 (1976). The extant scheme of *Abood* allowing the formation of a class of agency fee payers and concomitant demands upon them for their financial support of the CTA, accomplishes this intrusion and violation of the First Amendment to the Constitution.

The judicial record of this country over the last thirty-five years shows the experiment in *Abood* permitting the infringement of First Amendment rights should no longer be tolerated.

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should be reversed and remanded.

Respectfully submitted,

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